No. 93-289

IN THE

Supreme Court of the United States

October Term, 1993

JOHN H. DALTON, Secretary of the Navy, *et al.*,

Petitioners,

against

ARLEN SPECTER, *et al.*,

Respondents.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

AMICUS CURIAE BRIEF OF THE STATE OF NEW YORK IN SUPPORT OF RESPONDENTS

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Dated: January 5, 1994

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(3588—1994)
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Interest of the *Amicus Curiae*

New York has a strong economic and military interest in ensuring that military bases in the State and the Plattsburgh Air Force Base ("PAFB") in particular, remain open. The closure of the base will have a significant impact on the State's economy in the North Country region and will mean the loss of more than three thousand jobs. In addition, New York relies on the PAFB for state military operations and the closing of the base will adversely affect the State's military readiness.

On December 6, 1993, the State of New York, the Governor of New York, legislative officials, unions and persons employed at the PAFB ("the State of New York"), commenced an action in federal court against the Defense Base Closure and Realignment Commission ("the Commission") and its members, the Secretary of Defense ("the Secretary") and the Secretary of the Air Force, challenging the process used and determination made by the Commission in 1993 and accepted by the President, to close PAFB. *The State of New York, et al. v. The Defense Base Closure and Realignment Commission, et. al.*, Complaint ("Cplt."), 93-CV-1525 (N.D.N.Y.) (TJM). As set forth in its federal complaint,[1] New York alleges: that the decision to close PAFB was made in violation of neutral, objective legal standards contained in the Defense Base Closure and Realignment Act of 1990 ("the 1990 Act"), that the role of the Secretary under the 1990 Act in issuing and then applying certain criteria to a force-structure plan was usurped by the unauthorized acts of the Commission, and that the President exceeded his authorized powers in approving the

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[1] "____a" refers to the pages from New York's federal complaint which is an appendix to this brief.

Commission's recommendation to close the base.[2]

Both in its own case and before this Court, New York has a strong public policy interest in seeking to ensure that the President and the Congress make informed decisions about national security pursuant to a fair and orderly process that gives appropriate recognition to the military importance of the PAFB in defending this country. The Second Circuit recently held that claims of violations of the 1990 Act are justiciable, for the reasons set forth by the Third Circuit in *Specter. County of Seneca v. Cheney*, ____ F.3d ____, 1993 WL 504463 at p. 11, n.2 (2d Cir. Dec. 9, 1993). New York therefore has a substantial interest in supporting respondents' arguments in favor of judicial review.

Petitioners' arguments opposing any form of judicial review are completely at odds with Congress's intent to provide a "fair process" for closing military bases. If judicial review is precluded, the Commission will have been allowed to close the Philadelphia Naval Shipyard without observing any of the constraints Congress imposed on its decisionmaking. The federal government's harsh and extreme position in the *Specter* case thwarts the will of Congress.

[2]Specifically, on March 15, 1993, the Secretary sent to Congress and the Commission his 1993 report for base closures and realignments which contained no recommendation for PAFB to be closed or realigned but recommended that PAFB become the east coast home base of one of the newly-conceived composite units called Air Mobility Wings. *DoD Base Closure and Realignment Report to the Commission* ("*1993 DoD Report*") (March 1993), Vol. V, p. 37. Nevertheless, the Commission decided to consider PAFB for closure or realignment and ultimately recommended to the President that it be closed without following the standards and limitations contained in the 1990 Act. 20a-23a. The President accepted the Commission's recommendation to close PAFB when he approved all of the Commission's recommendations. 24a

Statement of the Case

The 1990 Act, as amended, 10 U.S.C. 2687 note (Supp. IV 1992),[3] is the latest in a series of statutes[4] enacted by Congress during the past fifteen years to regulate the process by which domestic military bases are closed or realigned.[5] The 1990 Act was passed by Congress to provide "a fair process" for the timely closing and realignment of military installations inside the United States. § 2901(b). In order to ensure that the process is fair and orderly, the 1990 Act requires that specific standards and timetables be adhered to at each of five stages.

The first step in the closure process principally takes place within the Department of Defense. The 1990 Act specifies that, as part of the Department of Defense's budget for fiscal years 1992, 1994 and 1996, the Secretary formulate a force-structure plan for the Armed Forces based on an assessment by the Secretary of probable threats to the national security for a six-year period and transmit that plan to Congress and to the Commission. § 2903(a).

[3]The 1990 Act was enacted as Pub. L. No. 101-510, Tit. XXIX, 104 Stat. 1808. It is codified at 10 U.S.C. 2687 note as sections 2901-2926. The 1990 Act has been amended twice by the Department of Defense Authorization Bills for Fiscal Year 1992/93 and 1993, Pub. L. 102-190 and Pub. L. 102-484. *See* Brief For the Petitioners ("Pet. Br.") at p. 2, n.1.

[4]The history of the prior statutes is discussed in the Third Circuit's earlier decision in this case, *Specter v. Garrett*, 971 F.2d 936, 939-40 (3rd Cir. 1992).

[5]Realignment is defined in the 1990 Act as "any action which both reduces and relocates functions and civilian personnel positions ...." § 2910(5).

In addition, the Secretary was required to publish in the Federal Register and transmit to the congressional defense committees the proposed[6] and final criteria to be used in making recommendations for closing or realigning military installations. § 2903(b). This process was to be completed by February 15, 1991, and the final criteria were to be the criteria used in making recommendations unless they were disapproved by a joint resolution of Congress enacted on or before March 15, 1991. § 2903(b)(2)(A), (B).[7]

The Secretary was then authorized,[8] "[o]n the basis of the force-structure plan and the final criteria," to publish in the Federal Register and transmit to the Commission and to the congressional defense committees a list of the military installations that the Secretary recommends to be closed or realigned together with a summary of the selection process that resulted in the recommendation for each installation and a justification for each recommendation. § 2903(c)(1) and (2). This process was to be completed for 1991 closures by April 15, 1991, and for 1993 and 1995 closures by March 15 of the respective year. § 2903(c)(1). The 1990 Act also requires that the Secretary make available to Congress, the Commission and the Comptroller General, "all information" used to prepare the recommendations, and that persons responsible for providing information to the Secretary

[6]The Secretary was required to provide an opportunity for public comment on the proposed criteria for a period of at least thirty days and provide notice of that opportunity in the Federal Register publication. § 2903(b)(1).

[7]On February 15, 1991, the Secretary published eight final criteria governing base closure and realignment. 56 Fed. Reg. 6374. The first four criteria give priority consideration to military value. The other criteria consider return on investment and impacts.

[8]The statute provides that the Secretary "may" publish and transmit his recommendations for installations to be closed or realigned.

or the Commission certify the completeness and accuracy of the information. § 2903(c)(4), (5).

The second step in the closure process involves proceedings before the Commission. The Commission is an independent body whose eight members are appointed by the President with the advice and consent of the Senate. § 2902. The 1990 Act requires the Commission, after receiving the Secretary's recommendations, to hold public hearings and to transmit to the President a report containing the Commission's findings and conclusions for closing and realigning military installations. § 2903(d)(1), (2).[9] The Commission's report to the President must be transmitted no later than July 1 of each year in which the Secretary transmits base closure and realignment recommendations to it and a copy of the report is simultaneously sent to the congressional defense committees. § 2903(d)(2), (3).

The Commission is empowered to change the Secretary's recommendations *only* if it determines that the Secretary "deviated substantially from the force-structure plan *and* final criteria. . . ." § 2903(d)(2)(B)[emphasis supplied]. Even if the Commission makes that determination, the Commission may *not* add an installation to be closed or realigned or increase the extent of realignment from the list recommended by the Secretary unless it also (i) determines that the change is consistent with the force-structure plan and final criteria referred to above; (ii) publishes a notice of the proposed change in the Federal Register not less than thirty days before transmitting its recommendations to the Presi-

[9]The Comptroller General is required to assist the Commission, to the extent requested, in its review and analysis and to transmit to Congress and the Commission a report containing a detailed analysis of the Secretary's recommendations. § 2903(d)(5).

dent; (iii) conducts public hearings on the proposed change; and (iv) "explain[s] and justif[ies] in its report submitted to the President . . . any recommendation that is different from the recommendation made by the Secretary. . . ." § 2903(d)(2)(C), (D).

The third step in the process consists of the President's review. The President must, by July 15, transmit to the Commission and to the Congress "a report containing the President's approval or disapproval of the Commission's recommendations." § 2903(e)(1). If the President approves all of the Commission's recommendations, he must transmit a copy of such recommendations to the Congress together with a certification of his approval. § 2903(e)(2).

The President may also disapprove any or all of the Commission's recommendations in which case he transmits to the Commission and the Congress by July 15 the reasons for his disapproval. The Commission then has until August 15 to send to the President a revised list of recommendations and the President has until September 1 to approve or disapprove all of the revised recommendations of the Commission and to transmit to the Congress a copy of the revised recommendations together with a certification of approval. § 2903(e)(4). If the President does not act by September 1, or does not approve the revised list of recommendations in their entirety, the closure and realignment process for that year is terminated. § 2903(e)(5).

The fourth step in the process consists of Congressional review. The Congress has forty-five days from the date the President transmits his report and approval certification to it or the date Congress adjourns for the session, whichever is earlier, to enact a joint resolution disapproving the recommendations of the Commission. § 2904(b). *See also* § 2908. If such a resolution is not enacted, the Commission's recommendations, as approved by the President, become final.

In the fifth and final step of the process, the Secretary is required to initiate all closures and realignments no later than two years after the date the President transmits the report to Congress and to complete all such closures and realignments within six years of that date. § 2904(a). *See also* §§ 2905, 2906, 2907.

The legislative history of the 1990 Act demonstrates that Congress sought to craft an expedited closure and realignment process while at the same time ensuring that the process proceeds in an orderly and fair manner with significant public input. The legislative history also supports a meaningful role for the courts in reviewing the Secretary's and the Commission's compliance with the procedural and substantive standards in the 1990 Act.

The Conference Report, from which the final bill emerged, explains that the 1990 Act provides a new process to "permit base closures to go forward in a prompt and rational manner." H. Conf. Rep. No. 101-923 at p. 705, *reprinted in* 1990 U.S. Code Congressional and Administrative News ("U.S.C.C.A.N.") 3257. At the same time, the Report notes that the Act provides for "public and Congressional review" of the criteria used by the Secretary in selecting bases for closure or realignment and for the Commission to "publicly evaluate" the Secretary's closure and realignment proposals and report its findings to the President. 1990 U.S.C.C.A.N. 3256. In addition, the Report makes clear that "both the President and the Congress would have opportunities to accept or reject *the Commis-*

sion's recommendations in their entirety under expedited procedures." *Ibid.* (emphasis supplied)

Finally, the Report seeks to accommodate judicial review within a prescribed period. The Report notes that one of the failings of existing law is that it "involve[s] *numerous* opportunities for challenges in court." 1990 U.S.C.C.A.N. 3257 (emphasis supplied). However, the Report specifically mentions that judicial review would be limited in only two areas - claims under the National Environmental Policy Act ("NEPA") would be circumscribed and claims under provisions of the Administrative Procedure Act ("APA") concerning rulemaking, hearings and adjudications, 5 U.S.C. §§ 553, 554, 556 and 557, would be precluded since the APA contains an exemption in these sections to the extent there is involved a "military or foreign affairs function." 1990 U.S.C.C.A.N. 3256, 3258.

Summary of Argument

Judicial review of the Commission's and the Secretary's unauthorized actions as well as the President's approval of those actions is available under the APA and the common law, and the 1990 Act does not preclude such review.

The APA entitles respondents, who are aggrieved by the Commission's and the Secretary's actions in recommending the closure of the Philadelphia Naval Shipyard ("the Shipyard"), to challenge final agency action which is contrary to law and in violation of lawful procedure. 5 U.S.C. §§ 704, 706(2). Judicial review of the Commission's actions as well as the Secretary's intermediate actions is available because the Commission's recommendations constitute "final

agency action" within the meaning of the statute. The fact that the President approves those recommendations and the Congress may disapprove them does not render the Commission's actions non-final for purposes of APA review. It is the Commission's recommendations in their entirety and only those recommendations that are transmitted to Congress. § 2903(e). Therefore, it is the Commission's recommendations that directly cause the injury about which respondents and the State of New York complain.

Accordingly, this is not a case like *Franklin v. Massachusetts*, ____ U.S. ____, 112 S.Ct. 2767, 120 L.Ed.2d 636 (1992) ("*Franklin*"), where this Court held that the "final agency action" was the President's statement to the Congress containing the census count and reapportionment allocation and not the report sent to the President by the Secretary of Commerce. That statement contained the President's independent evaluation of the data and information submitted to him and the President had the unfettered discretion to modify the data and the allocation. In comparison, under the 1990 Act, the President has only a limited ability to cure defects in the closure process at the Secretary and the Commission levels and the recommendations he transmits to Congress are the Commission's, not his own.

In addition, the 1990 Act and its legislative history fully support judicial review under the APA of the Secretary's and the Commission's actions which violate the procedural and objective standards in the statute. The Act itself contains no provision limiting judicial review of agency action under the APA. Moreover, contrary to petitioners' arguments, the history, structure and purpose of the 1990 Act are entirely consistent with the presumption of judicial review. Congress sought only to limit the opportunities for judicial

review that may delay the closure process and specifically restricted review only of claims brought under NEPA. The Court of Appeals below properly balanced Congress's desire for expedition with respondents' entitlement to court review of alleged violations of specific constraints on the Secretary's and the Commission's decisionmaking in the 1990 Act.

Finally, judicial review of the President's actions in approving the Commission's recommendations is authorized under the common law. As the Third Circuit recognized, the courts have historically been available to review unconstitutional and *ultra vires* actions of the President. The President approved the Commission's recommendation to close the Shipyard and therefore allegedly acted in violation of the constitutional separation of powers and contrary to the 1990 Act. This Court's decision in *Franklin*, which held that there is plenary review of the President's allegedly unconstitutional actions under the census provision, is entirely supportive of respondents' position.

ARGUMENT

The APA, the 1990 Act and the common law authorize the federal courts to review the process the Secretary and the Commission followed, as well as their compliance with specific objective standards, in recommending to the President military installations in the United States for closure or realignment.

Respondents seek judicial review to overturn the decision to close the Shipyard because it was purportedly not based upon the type of "fair" process contemplated by Congress in the 1990 Act. As will be shown by New York, judicial

review of the Commission's recommendations to close the Shipyard is available under the APA and the common law. Nothing in the 1990 Act or its legislative history clearly demonstrates that Congress intended to foreclose judicial review of unauthorized recommendations for closure of military installations made by the Commission, or the unauthorized approval of those recommendations by the President.[10]

1. APA Review Is Authorized Under 5 U.S.C. §§ 701 *et. seq.*

Respondents (and New York) assert a claim for relief under Section 706(2) of the APA which authorizes the courts to hold unlawful and set aside agency action that is found to be, *inter alia*, arbitrary and capricious, in excess of statutory authority or in violation of lawful procedure. *See* Joint Appendix ("JA") 58; *see also* 41a-42a. In order to obtain judicial review under the APA, respondents must allege, as they have done, that they have been adversely affected or aggrieved by final agency action within the meaning of the 1990 Act. 5 U.S.C. §§ 702, 704. (JA 11, 13-16). The APA authorizes judicial review of such agency action unless the statute at issue precludes review, the agency action is committed to the discretion of the agency by law (5 U.S.C. § 701[a]) or the agency is not an authority of the Government of the United States or is otherwise excluded from the definition of "agency" in 5 U.S.C. § 701(b).

[10]Although New York's complaint does not challenge the actions of the Secretary, who performed his role properly in New York's case, New York's argument is not restricted to actions of the Commission and is fully supportive of respondents' position that the Secretary's conduct can be reviewed.

Petitioners argue that APA review of the validity of the Secretary's and the Commission's actions under the 1990 Act is precluded for two independent reasons: first, the "final agency action" about which respondents complain is the President's decision to close the Shipyard and, under this Court's decision in *Franklin*, the President does not come within the APA's definition of "agency" and his actions are, therefore, not subject to APA review (Pet. Br. at 17-18);[11] and second, judicial review is antithetical to the structure, history and purpose of the 1990 Act (Pet. Br. at 35-48). Petitioners' arguments should be rejected.

With respect to the APA, the actions of the Commission constitute "final agency action" within the meaning of 5 U.S.C. § 704 and this Court's decision in *Franklin* is not controlling. In *Franklin*, the State of Massachusetts and others sought to overturn the State's reapportionment based on the census count which included military persons overseas and counted them in their "home of record." The Secretary of Commerce had formulated this policy and the President had accepted it when he ultimately transmitted the final census count and reapportionment figures to the Congress under the automatic reapportionment statutes. A three-judge federal court held that the Secretary of Commerce's decision to count military employees overseas and to use "home of record" as the basis for the allocation was arbitrary and capricious under § 706(2) of the APA. *See* 112 S.Ct. at 2773, 120 L.Ed.2d at 647.

[11]Both the Third Circuit below and the First Circuit in *Cohen v. Rice*, 992 F.2d 376 (1st Cir. 1993), held that *Franklin* is controlling with respect to claims brought under the APA. For the reasons discussed below, New York respectfully disagrees.

This Court reversed the lower court's decision and held that the APA did not apply. Writing for the majority, Justice O'Connor concluded that the final agency action was the President's action in transmitting to Congress a statement, based on the Commerce Secretary's report, showing the whole number of persons in each State and the number of Representatives each State would be entitled under an equal apportionment. 112 S.Ct. at 2775, 120 L.Ed.2d at 650.

In reaching this conclusion, Justice O'Connor reasoned that the President has an independent role under the automatic reapportionment statute—he is authorized to modify or reject the policy decisions made by the Secretary of Commerce, make new calculations and direct the Secretary of Commerce to reform the census even after the data is submitted to him. 112 S.Ct. at 2774, 120 L.Ed.2d at 649. Indeed, this Court pointed out that the Secretary of Commerce's report to the President is not promulgated to the public and no official administrative record of it is generated. 112 S.Ct. at 2773, 120 L.Ed.2d at 647. Moreover, "[T]he Secretary's report to the President carries no direct consequences for the reapportionment" and is "more like a tentative recommendation than a final and binding determination. . . ." 112 S.Ct. at 2774, 120 L.Ed.2d at 649.

Justice O'Connor then considered whether the APA applies to the President's actions under the census statutes and concluded that it does not. This Court reasoned that, even though the President is not specifically included or excluded from the APA's definition of agency, "[o]ut of respect for the separation of powers and the unique constitutional position of the President, we find that the textual silence is not enough to subject the President to the provisions of the APA." 112 S.Ct. at 2775, 120 L.Ed.2d at 650.

The President's and the Commission's roles in base closure are substantially different from the President's and the Commerce Secretary's roles under reapportionment. Under the 1990 Act, the President is empowered to approve or disapprove the Commission's recommendations in their entirety and, if he approves the recommendations, "transmit to the . . . Congress a report containing the President's approval . . . of *the Commission's recommendations.*" § 2903(e)(1)[emphasis supplied] Unlike the statement he sends to Congress containing the census count and reapportionment distribution, the President does not send to Congress a report containing *his* closure and realignment determinations, but he is obliged to accept or reject *the Commission's recommendations in their entirety* and if he approves of all the recommendations, he must transmit a copy of *the Commission's recommendations* to the Congress. § 2903(e)(2).

Moreover, during the brief period of time that he has to review the Commission's report,[12] the President has a limited opportunity, if any, to consider whether the Commission and the Secretary followed proper procedures in arriving at their respective recommendations. Even if the President is dissatisfied with the Commission's actions, the President may only reject its report and transmit to the Commission the reason(s) for his disapproval. § 2903(e)(3). After the Commission sends him its revised report and recommendations, the President again must approve or disapprove the recommendations *in their entirety* and, if he

[12]The President must receive the Commission's report by July 1 and approve or disapprove it by July 15. § 2903(d)(2)(A), (e)(1). With respect to the Commission's 1993 report recommending the closure of PAFB, the President received the report on July 1 and gave his approval to all of the recommendations on July 2. 24a

approves of them, transmit *the Commission's* revised recommendations to Congress with his certification of approval. § 2903(e)(4). Since the 1990 Act requires an all or nothing decision, the President may decide to approve the Commission's recommendations even though he is dissatisfied with particular aspects of the Commission's report.

While the President's actions under the 1990 Act are not ministerial, the report he transmits to Congress contains the Commission's recommendations with his stamp of approval. If Congress does not enact a joint veto resolution, the Commission's recommendations become the "final agency action." It is the Commission's recommendations, once approved by the President, that have direct and immediate consequences for affected persons, communities and entities like the respondents in *Specter* and the State of New York.[13]

The fact that the Commission is required to conduct its proceedings in the public arena and issue a report to the President which is available for public scrutiny, supports respondents' position that the Commission's decisionmaking process has all of the attributes of public accountability to which the APA was intended to apply. New York's complaint shows the important role that public scrutiny would play in judicial review under the 1990 Act -- the record of the Commission's public hearings, meetings and votes demonstrate, *inter alia,* that the Commission simply ignored the

[13]Since the Commission's recommendations constitute "final agency action" within the meaning of the APA, respondents may also challenge the intermediate actions of the Secretary and the Secretary of the Navy pursuant to 5 U.S.C. § 704, which provides that an "intermediate agency action or ruling not directly reviewable is subject to review on the review of the final agency action."

standard in the 1990 Act that it must find that the Secretary "substantially deviated" from the force-structure plan *and* the final criteria when it recommended that PAFB be closed. *See* 20a-23a.

Accordingly, judicial review of the Commission's and the Secretary's actions lie under the APA unless Congress precluded such review in the 1990 Act itself. However, Congress did not do so.

2. The 1990 Act Does Not Preclude Judicial Review

Petitioners' alternative argument under the APA is that Congress intended in the 1990 Act to preclude judicial review of the entire base closure process and the decisions made therein. Pet. Br. at 35 *et. seq.*[14] Since no provision in the 1990 Act states that judicial review of all claims is precluded, petitioners point to the history of the base closure process, the structure and the purpose of the 1990 Act to support their contention. *Ibid.* However, as this Court has stated, "[J]udicial review of a final agency action by an aggrieved person will not be cut off unless there is persuasive reason to believe that such was the purpose of Congress." *Bowen v. Michigan Academy of Family Physicians*, 476 U.S. 667, 670 (1986).[15]

[14]The Third Circuit held that the 1990 Act impliedly precludes review of substantive challenges made to the base closure process but does not preclude review of claims that the Secretary and the Commission failed to comply with "specific, non-discretionary directives of the" Act. *Specter*, 995 F.2d at 409 and n.5; *see also* 971 F.2d at 946-53. The Solicitor General contends that the procedural/substantive distinction drawn by the Third Circuit is not supported by the statute and is unworkable. Pet. Br. at 47-48. (The First Circuit in *Cohen v. Rice* did not reach this issue. 992 F.2d at 382, n.5).

New York does not agree that certain actions cannot be reviewed under the 1990 Act if the review can proceed expeditiously and is limited to whether there was compliance with the objective standards in the statute.

The history, structure and purpose of the 1990 Act show only that Congress sought to expedite the closure process and to limit the opportunities for individual legislators and constituencies to delay closure but they do not demonstrate that Congress intended to preclude all judicial review if the process went awry. *See* 1990 U.S.C.C.A.N. 3256-59.[16] Petitioners argue that judicial review would disrupt and undermine the "direct, and carefully balanced, participation of

[15]If petitioners are correct, the *ultra vires* actions of the Commission in New York's case and of the Secretary of the Navy and the Commission in the *Specter* case would go unchecked. Under petitioners' argument, even if the President was presented with a recommendation to close the PAFB which was issued without any consideration of the force-structure plan and which completely ignored the findings and conclusions of the Secretary, the fact that the President approved the Commission's entire package of recommendations and that Congress could have disapproved the recommendations insulates any particular recommendation from judicial review, including a review as to whether there was compliance with the procedures set forth in the 1990 Act. That position cannot be squared with the language and structure of the 1990 Act, discussed below.

[16]The Solicitor General mistakenly argues that the court of appeals erred in applying a presumption of reviewability to challenges arising under the 1990 Act since the presumption is misplaced when sensitive questions of national security and military policy are at issue. Pet. Br. at 36-37. It is the traditional role of the courts to determine whether agency action conforms to clear and objective standards in a statute. The fact that the statute addresses questions of military policy does not affect the presumption of reviewability of such questions. The Solicitor General confuses this presumption with the reluctance of

(Footnote continued on next page.)

the President and Congress." Pet. Br. at 40. However, the two are not mutually exclusive.

To the contrary, the purpose and structure of the 1990 Act are entirely supportive of judicial review to ensure that the decisional process is a fair one. Specifically, the fact that the 1990 Act contains substantive standards to limit the Secretary's and the Commission's decisionmaking, requires adherence to strict timetables and provides for public scrutiny, demonstrates that judicial review is compatible with Congress's desire to improve the integrity of the process. As the Third Circuit explained in its earlier opinion in this case:

> we know from the legislative history that Congress was very sensitive to the impact that base closing and realignments have on the livelihood and security of millions of Americans and to the importance of public confidence in the integrity of the decisionmaking process. . . . In this context, accepting the brief delay occasioned by judicial review seems to us entirely consistent with the statutory scheme.

Specter, supra, 971 F.2d at 948.

(Footnote continued.)
courts to second-guess national security decisions made by the President and involving military judgment and expertise. More importantly, New York alleges in its case that the Commission, in deciding to close PAFB, ignored the military judgment and expertise of the established federal agency responsible for such decisionmaking. The federal government should not be allowed to use the guise of deference to military decisionmaking to shield the decision of a civilian board from judicial review where that decision is contrary to the recommendations of the country's military policymakers.

Petitioners argue further that judicial review is inconsistent with Congress's goals of expedition and finality and point to the express exception in the 1990 Act from the requirements of NEPA. Pet. Br. at 41-45. While judicial review will mean that a certain amount of delay may have to be tolerated, the delay need not be very long and it does not have to interfere with the Secretary's implementation schedule. Challenges to the Commission's alleged failure to observe the standards of the 1990 Act, such as are alleged in New York's complaint, can be decided in an expedited manner, with minimal (if any) discovery followed by cross-motions for summary judgment under Federal Rules of Civil Procedure 56.[17] As the *Specter* court observed:

> Judicial review . . . holds no more potential for delay in implementing the final decision than exists in most of the broad range of situations in which Congress has countenanced judicial review. Moreover, the process for carrying out decisions to close and realign bases is complicated and time-consuming, . . .; bases are not closed or realigned overnight.

[17]New York's complaint contains nine claims for relief arising under the 1990 Act, the APA and the U.S. Constitution. 24a-43a (Cplt. ¶¶ 70-145). New York asserts, *inter alia*, that the Commission violated the 1990 Act by determining that PAFB should be closed where: (i) the Secretary made no such recommendation concerning that base; (ii) the Commission failed to determine that the Secretary deviated substantially from the force-structure plan *and* the final criteria; and (iii) the Commission failed to explain and justify its departure from the Secretary's recommendation. 24a-33a (Cplt. ¶¶ 70-106) In addition, the complaint asserts that neither the Constitution nor the 1990 Act authorizes the President to approve the Commission's recommendations where such recommendations exceed the scope and constitute an abuse of the Commission's authority. *Ibid.*

Specter, *supra*, 971 F.2d at 948. Similarly, the fact that Congress allowed review under NEPA in some circumstances but not others, and did not specify that judicial review is generally excluded, shows that petitioners' reliance on the NEPA exclusion in the 1990 Act is misplaced. § 2905(c)(2). *See also Specter*, *supra*, 971 F.2d at 948 and n.10.

Petitioners also cite to a passage in the legislative history suggesting that certain "final agency action[s]" would not be subject to judicial review under the APA and argue that the passage reinforces their contention that Congress intended to preclude review of final agency action. Pet. Br. at 45-46, *quoting* H.R. Conf. Rep. No. 101-923 at 706. Petitioners omit that Congress limited its discussion to Chapter 5 of the APA which makes an exception to rulemaking and adjudication for the conduct of military affairs. That exception does not apply to judicial review based upon 5 U.S.C. § 706(2) which is the section of the APA involved in this case. As the *Specter* court notes, "[T]his passage is at best ambiguous." 971 F.2d at 949.

Finally, petitioners argue that judicial intervention would give rise to serious remedial problems which are incompatible with the structure of the 1990 Act. Pet. Br. at 46-47. Petitioners point out that the Commission goes out of existence after each base closing session is concluded and that the Secretary has a mandatory duty to implement the final decision of the President. *Ibid.*

Petitioners' discussion of remedial problems is premature. Petitioners ignore that the courts have the inherent authority to fashion a remedy least disruptive of the closure and realignment process. Petitioners' statement that the courts lack authority to enjoin the Secretary's performance of his duty to implement the President's decision based on actions that occurred before the President acted, confuses the Court's remedial powers with the merits of whether judicial review properly lies. As this Court recognized in *Franklin*, appropriate relief lies against the agency official responsible for enforcing acts of the President alleged to be unconstitutional. *Franklin*, *supra*, 112 S.Ct. at 2777, 120 L.Ed.2d at 652. The same principle of law must apply in the event this Court determines that judicial review of the Secretary's and the Commission's actions are authorized.

3. Judicial Review of the Challenged Actions Is Authorized By the Common Law

Petitioners' final argument is that judicial review of the challenged actions is unavailable despite *Franklin's* alternative holding that constitutional challenges to Presidential action are justiciable. Pet. Br. at 19-34.[18] In petitioners' view, the Third Circuit's holding would swallow the *Franklin* rule and the limited exception to that rule for claims properly raised under the Constitution. Pet. Br. at 20.

Petitioners make several points challenging the Third Circuit's reasoning and its conclusion that common law judicial review exists, under the separation of powers doc-

[18]Petitioners' argument is premised on its prior argument that the final agency action subject to review is the President's decision to approve the Commission's recommendations. For the reasons discussed above, New York does not agree with that argument.

trine as well as under the 1990 Act itself, for the President's *ultra vires* action in approving the unauthorized recommendation of the Commission to close the Shipyard. *See Specter, supra*, 995 F.2d at 409-411. First, petitioners point out that respondents have not alleged that the President violated the Constitution or the 1990 Act and that their only constitutional claim, a denial of due process, was dismissed at an earlier stage of the proceedings.[19] Petitioners then argue that the Court of Appeals improperly reached out to the President's actions and that its analysis that the President violates the Constitution whenever he violates the 1990 Act, under separation of powers, is flawed. Pet. Br. at 19-30.

Respondents have sued the Secretary, the Secretary of the Navy, the Commission and its members and alleged that these petitioners violated their right to a fair process under the 1990 Act and that the Secretaries are authorized to implement the final decision closing the Shipyard. JA 16-17, 57-58. The fact that respondents have not sued the President or specifically alleged that he acted *ultra vires* does not restrict the court's authority to review Presidential action or provide appropriate relief, however.

In *Franklin*, this Court stated that the President's actions can be reviewed in a suit against the Secretary of Commerce. Justice O'Connor's opinion held that declaratory relief against

[19]New York's complaint, on the other hand, specifically alleges that the President exceeded his authorized powers under the 1990 Act and the constitutional separation of powers doctrine. 24a-33a, 40a. New York's complaint also alleges that the Commission and the President's actions deprived the plaintiffs of a property interest in the continued operation of PAFB without due process of law. 39a. Accordingly, to the extent petitioners' argument rests on the pleadings alone, New York's complaint would still be entitled to judicial review under the common law. *But see* Pet. Br. at 33-34 and n.22.

the Secretary of Commerce was sufficient to establish standing even though the final agency action under review was that of the President. 112 S.Ct. at 2777, 120 L.Ed.2d at 652. Justice O'Connor noted that injunctive relief against the President was reserved for extraordinary situations, and she reasoned that "[w]e may assume it is substantially likely that the President . . . would abide by an authoritative interpretation of the census statute and constitutional provision by the District Court, *even though [he] would not be directly bound by such a determination.*") *Ibid.* (Emphasis added.) Respondents' suit naming the officials who are responsible for implementing the final recommendation is therefore sufficient to review the President's actions. *See* JA 16-17, 57-58.

In addition, nothing in *Franklin* or this Court's opinion in *Youngstown Sheet & Tube Co. v. Sawyer*, 343 U.S. 579 (1952) restricts the court's powers to review the President's actions in violation of a statute. *See* 112 S.Ct. at 2777, 120 L.Ed.2d at 652 ("we may assume . . . that it is substantially likely that the President . . . would abide by an authoritative interpretation of the census statute *and* constitutional provision. . . .")(emphasis added). *See also Specter, supra*, 995 F.2d at 409.

Second, petitioners' argument that the Court of Appeals' reasoning would permit review of every claim of procedural error (Pet. Br. at 24-30) is simply misplaced. As the *Specter* court recognized, "plaintiffs allege that the process underlying the decision to close the Shipyard violated specific nondiscretionary provisions of the" 1990 Act. 995 F.2d at 408-409. Such allegations go to the heart of the statute since they involve the integrity and fairness of the process. Judicial review of such claims is essential because, if respondents are

correct, the recommendations presented to the President were without any basis under the 1990 Act.[20]

In any event, the President's approval of an unauthorized recommendation of the Commission implicates the constitutional separation of powers. As the Third Circuit properly concluded, the failure of the President to act within his statutorily delegated limits exceeds not only his statutory authority but his constitutional authority as well. *Specter*, *supra*, 995 F.2d at 409. The Third Circuit's reasoning is the most sensible interpretation of this Court's decision in *Youngstown*, which discussed the President's statutory as well as constitutional authority, and is supported by the *Franklin* decision's reference to the President's compliance with the census statute as well. Petitioners' argument would deny the courts the authority to review Presidential action in violation of statutes (Pet. Br. at 30-34). That position is contrary to the courts' role under the separation of powers doctrine and must be rejected.

Finally, petitioners' contention that, even if the Secretary and the Commission violated the statute, the President did not act *ultra vires* because he is not bound by the recommendations sent to him (Pet. Br. at 24-30), is simply wrong. The 1990 Act provides that the *Commission's recommendations* are transmitted to Congress with the President's certification of approval. § 2903(e). While the President has a single oppportunity to disapprove the package sent to him, he must eventu-

[20]Similarly, New York has alleged that the Commission ignored its statutory authority when it recommended that PAFB be closed without any reference to the force-structure plan and despite any recommendation concerning PAFB in the Secretary's report to it. New York also alleges that the Commission failed to make adequate findings and justifications for its recommendation. 24a-30a. These allegations also go to the integrity of the closure process.

ally approve all of the recommendations and, if he does not, the closure process is terminated. *Ibid.* Under these circumstances, the President's discretion is circumscribed and it is critical that the recommendations of the Commission sent to him comply with the mandatory criteria contained in the Act. When the Commission exceeds its authority under the Act and the President approves a recommendation which is without basis in the statute, the President also acts *ultra vires* and contrary to the 1990 Act. As the *Specter* court recognized:

> Congress intended that domestic bases be closed *only* pursuant to an exercise of presidential discretion *informed by recommendations of the nation's military establishment and an independent commission based on a common and disclosed (1) appraisal of military need, (2) set of criteria for closing, and (3) data base.* Congress did not simply delegate this kind of decision to the President and leave to his judgment what advice and data he would solicit. Rather, it established a specific procedure that would ensure balanced and informed advice to be considered by the President and Congress before the executive and legislative judgments were made.

Specter, *supra*, 971 F.2d at 947 (emphasis in original).

CONCLUSION

For all of the above reasons and for the reasons set forth in respondents' brief, the order of the Court of Appeals should be affirmed.

Dated: Albany, New York
January 5, 1994

Respectfully submitted,

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APPENDIX — Complaint in *The State of New York, et al., v. The Defense Base Closure and Realignment Commission, et al.*, 93-CV-1525 (N.D.N.Y.) (TJM)

UNITED STATES DISTRICT COURT

NORTHERN DISTRICT OF NEW YORK

THE STATE OF NEW YORK; MARIO M. CUOMO, as Governor of the State of New York; JOHN M. MCHUGH, as United States Congressman from the 24th Congressional District of New York State; RONALD B. STAFFORD, as a Member of the New York State Senate, Representing the 45th Senate District of New York State, GEORGE CHRISTIAN ORTLOFF, as a Member of the New York State Assembly, Representing the 110th Assembly District of New York State; CLYDE RABIDEAU, as Mayor of the City of Plattsburgh, New York; THE CITY OF PLATTSBURGH, NEW YORK; ARTHUR LEFEVRE, as Supervisor of the Town of Plattsburgh, New York; THE TOWN OF PLATTSBURGH, NEW YORK; WILLIAM BINGEL, as County Administrator of the County of Clinton, New York; THE COUNTY OF CLINTON, NEW YORK; JOHN J. DUFFY, as President of Local # 3735 of the American Federation of Government Employees; LOCAL # 3735 OF THE AMERICAN FEDERATION OF GOVERNMENT EMPLOYEES; JOHN J. DUFFY; BRIAN F. STONE, PHILLIP SPRAGUE, GIRARD F. CURTIS, JOHN BRYANT, JOHN WALLACE, and CLARENCE J. JEFFERIES,

Plaintiffs,

against

THE DEFENSE BASE CLOSURE AND REALIGNMENT COMMISSION, AND ITS MEMBERS: JAMES A. COURTER, CAPTAIN PETER B. BOWMAN, USN (RET.), BEVERLY B. BYRON, REBECCA G. COX, GENERAL H.T. JOHNSON, USAF (RET.), HARRY C. MCPHERSON, JR., AND ROBERT D. STUART, JR.; LES ASPIN, as United States Secretary of Defense; and SHEILA WIDNALL, as United States Secretary of the Air Force;

Defendants.

CV

Plaintiffs, by their attorneys, for their complaint against the defendants, allege:

PRELIMINARY STATEMENT

1. This lawsuit is brought to prevent the illegal and unprecedented attempt by the Defense Base Closure and Realignment Commission to replace the United States Department of Defense as the principal architect of American defense policy. In essence, the Commission, for the very first time, closed a military base (Plattsburgh Air Force Base) against the advice of, and without the required statutory input from both the United States Air Force and the United States Department of Defense, which both found that the continued functioning of this Base was central to the adequacy of the military preparedness of this nation. The recommendation by the Commission to close Plattsburgh Air Force Base is an action not only in violation of the

limited powers granted to the Commission by the Defense Base Closure and Realignment Act of 1990, but also one which has the potential of undermining the effectiveness of the defense of the United States. The Commission's actions challenged in this case, if allowed to stand, would establish a dangerous precedent allowing the Commission to ignore both the Air Force, the Department of Defense and the statutory limitations which are part of the process of closing military bases under the statute in issue.

2. More specifically, this is a civil action for a declaratory judgment, pursuant to 28 U.S.C. §§ 2201 and 2202, declaring and adjudging as void, illegal, and of no force and effect, the recommendation of the Defense Base Closure and Realignment Commission ("the Commission") to the President of the United States, ("the President") dated July 1, 1993, to close Plattsburgh Air Force Base, in Plattsburgh, New York, (the only active duty U.S. Air Force Base located east of the State of Ohio and North of the State of New Jersey), and the approval of the aforesaid Commission's recommendation by the President. Such judgment is sought upon the ground that the Commission in making the aforesaid recommendation, exceeded their authority under the Defense Base Closure and Realignment Act of 1990 (Public Law No. 101-510, Title XXIX, §§ 2901-2910, November 5, 1990) ("the Act"), because the Commission recommended that Plattsburgh be closed in the absence of any recommendation by the Secretary regarding the closure or realignment of the Base, and the Commission rejected the decision of Les Aspin, as United States Secretary of Defense, to keep Plattsburgh Air Force Base open, when there was no substantial deviation by the Secretary from his force structure plan and final criteria (used in identifying bases for closure or realignment) in the rendering of his recom-

mendation; and the President's approval of the closure of Plattsburgh Air Force Base was made after the submission to him of the Commission's recommendation for such closure, which recommendation was not made in accordance with the requirements of the Act. This action is further brought to obtain an injunction enjoining Les Aspin, as United States Secretary of Defense ("the Secretary"), Sheila Widnall, as United States Secretary of the Air Force, and their agents and employees, from taking any action to close Plattsburgh Air Force Base, predicated upon the approval of the President of the Commission's recommendation to close the Base and to further enjoin them from taking any action to make McGuire Air Force Base the home base of the East Coast Air Mobility Wing.

PARTIES

3. Plaintiff, the State of New York ("New York"), is a sovereign State of the United States of America, which includes within its boundaries Plattsburgh Air Force Base, in Plattsburgh, New York, and the geographic area covered by the United States District Court for the Northern District of New York.

4. Plaintiff, Mario M. Cuomo, is a citizen of the State of New York, and its duly elected and serving Governor, with his principal office located in the City and County of Albany and State of New York, which is within the judicial district covered by the United States District Court for the Northern District of New York.

5. Plaintiff, John M. McHugh, is a citizen of the State of New York, and the duly elected and serving United States

Congressman from the 24th Congressional District of New York, with offices located in the County of Clinton and State of New York, which is within the judicial district covered by the United States District Court for the Northern District of New York.

6. Plaintiff, Clyde Rabideau, is a citizen of the State of New York, and the duly elected and serving Mayor of the City of Plattsburgh, New York, with offices in the City of Plattsburgh, New York, which is within the judicial district covered by the United States District Court for the Northern District of New York.

7. Plaintiff, the City of Plattsburgh, New York, is a political subdivision of the State of New York, located within the geographic area covered by the United States District Court for the Northern District of New York, and includes within its boundaries portions of Plattsburgh Air Force Base.

8. Plaintiff, Arthur LeFevre, is a citizen of the State of New York, and the duly elected and serving Supervisor of the Town of Plattsburgh, New York, who resides and has offices in the Town of Plattsburgh, New York, which is within the judicial district covered by the United States District Court for the Northern District of New York.

9. Plaintiff, the Town of Plattsburgh, New York, is a political subdivision of the State of New York, located within the geographic area covered by the United States District Court for the Northern District of New York, and includes within its boundaries portions of Plattsburgh Air Force Base.

10. Plaintiff, William Bingel, is a citizen of the State of New York, and the duly appointed and serving County Administrator of the County of Clinton, New York, who resides and has offices in the County of Clinton, New York, which is within the judicial district covered by the United States District Court for the Northern District of New York.

11. Plaintiff, the County of Clinton, New York, is a political subdivision of the State of New York, located within the geographic area covered by the United States District Court for the Northern District of New York, and includes within its boundaries all of Plattsburgh Air Force Base.

12. Plaintiff, Ronald B. Stafford, is a citizen of the State of New York, and the duly elected and serving member of the Senate, representing the 45th Senate District of New York State, with offices located in the County of Clinton and State of New York, which is within the judicial district covered by the United States District Court for the Northern District of New York.

13. Plaintiff, George Christian Ortloff, is a citizen of the State of New York, and the duly elected and serving member of the Assembly, representing the 110th Assembly District of New York State, with offices located in the County of Clinton and State of New York, which is within the judicial district covered by the United States District Court for the Northern District of New York.

14. Plaintiff, John J. Duffy, is the president of the plaintiff, Union Local No. 3735 of the American Federation of Government Employees, and resides in the County of Clinton and the State of New York, which is within the judicial district covered by the United States District Court for the Northern District of New York.

15. Plaintiff, Union Local No. 3735 of the American Federation of Government Employees, is an unincorporated labor organization recognized and certified by the Federal Labor Relations Authority, under the Civil Service Reform Act of 1978 (5 U.S.C. § 7101 *et. seq.*), with principal offices located in the County of Clinton and State of New York, which is within the judicial district covered by the United States District Court for the Northern District of New York.

16. Plaintiff, Union Local No. 3735 of the American Federation of Government Employees, is the exclusive bargaining representative for approximately one-half or 250 of the total number of civilian employees of Plattsburgh Air Force Base, who perform in such capacities as welders, carpenters, vehicle mechanics, snow plow drivers, secretaries, clerks, groundskeepers and warehouse personnel.

17. Plaintiffs, John J. Duffy, Brian F. Stone, Phillip Sprague, Girard F. Curtis, John Bryant, John Wallace, and Clarence J. Jefferies are members of the aforesaid Union, and civilians employed at the Plattsburgh Air Force Base, who reside in the County of Clinton and State of New York, which is within the judicial district covered by the United States District Court for the Northern District of New York.

18. Plaintiff, John J. Duffy is a welder who has been a member of the aforesaid Union for 5 1/2 years, employed at Plattsburgh Air Force Base for 6 1/2 years, and employed by the Federal Government for 20 years. Plaintiff, Brian Stone is a quality assurance technician who has been a member of the aforesaid Union for 4 1/2 years, and employed at Plattsburgh Air Force Base for 5 years. Plaintiff, Phillip Sprague is an air field cleaner and equipment operator who has been a member of the aforesaid Union for 5 years, and employed at Plattsburgh Air Force Base for 9 years. Plaintiff Gerald F. Curtis is an electrician who has been a member of the aforesaid Union for 10 years, and employed at Plattsburgh Air Force Base for 20 years. Plaintiff, John Bryant is a mechanic who has been a member of the aforesaid Union for 5 years, and employed at Plattsburgh Air Force Base for 5 years. Plaintiff, John Wallace is a supply clerk who has been a member of the aforesaid Union for 4 years, employed at Plattsburgh Air Force Base for 10 years, and was a member of the military for 21 years. Plaintiff, Clarence J. Jefferies is a supply clerk who has been a member of the aforesaid Union for 5 years, employed at Plattsburgh Air Force Base for 7 years, and was a member of the military for 24 years.

19. Defendant, the Defense Base Closure and Realignment Commission, ("the Commission") is an independent commission created under § 2902(a) of the Act, which is charged with primary responsibilities thereunder, including insuring an independent, equal, lawful and fair process for closing and realigning military installations.

20. Defendant, James A. Courter, is the duly appointed and serving chairman of the Commission, and defendants Captain Peter B. Bowman, USN (ret.) Beverly B. Byron, Rebecca G. Cox, General H.T. Johnson, USAF (ret.), Harry

C. McPherson, Jr. and Robert D. Stuart, Jr. are duly appointed and serving members of the Commission.

21. Defendant, Les Aspin, is the duly appointed and serving United States Secretary of Defense, whose responsibilities include oversight of the military forces and formulation of the defense policy of the United States, and whose principal offices are located at the Pentagon, Washington, D.C.

22. Defendant, Sheila Widnall, is the duly appointed and serving United States Secretary of the Air Force, whose responsibilities include oversight of Plattsburgh Air Force Base in Plattsburgh, New York, and whose principal offices are located at the Department of the Air Force, the Pentagon, Washington, D.C.

23. Each of the defendants holding the offices indicated are sued in their official capacities only.

24. All of the above-mentioned plaintiffs representing the State of New York and its various political subdivisions, would be immediately, substantially and irreparably harmed by the closure of Plattsburgh Air Force Base, by virtue of representing political subdivisions and citizens which, for the reasons stated herein, will suffer immediate, substantial, and irreparable economic hardships from such a closure.

25. Plaintiff, the State of New York, would also be immediately, substantially, and irreparably harmed by the closure of Plattsburgh Air Force Base because:

a) the 174th Fighter Wing of the New York State Air National Guard at Syracuse, New York, uses for its training exercises refueling tankers from Plattsburgh Air Force Base;

b) Plattsburgh Air Force Base is a weather divert base to which the 174th Fighter Wing proceeds in the event of inclement weather conditions;

c) Plattsburgh Air Force Base is an emergency recovery base for the 174th Fighter Wing, to which fighters proceed in the event of problems encountered in the air;

d) The 105th and 109th Air Lift Groups of the New York State Air National Guard at Syracuse, New York use Plattsburgh Air Force Base for air crew proficiency training (approaches and landings);

e) The 106th Rescue Group of the New York State Air National Guard at Syracuse, New York uses Plattsburgh Air Force Base for water training, requiring the proximity of fresh water to an air force base.

The closing of Plattsburgh Air Force Base would pose significant problems to the conduct of the aforesaid training exercises, negatively affecting the military readiness of plaintiff, the State of New York.

26. Plaintiff, the City of Plattsburgh, New York, would be immediately, substantially and irreparably harmed by the closure of Plattsburgh Air Force Base, because it supplies the Base with sewer, water, and electrical services, and

would thereby lose substantial revenues from the decrease in demand for these services, and be forced to increase rates for these services to residents of the City. In addition, the closure of the Base would cause the loss of substantial City sales tax revenues, and the loss of significant numbers of jobs connected both directly and indirectly to the Base, thereby substantially increasing the City's unemployment rate. Furthermore, military contracts for base construction and updating of base facilities have been terminated, and future contracts will not be let, causing the loss of hundreds of construction-related jobs, with the resultant destabilization of the local economy. The sudden vacancy of the Base real property would decrease property values, resulting in increased real property taxes for City property owners, and until the Base property is sold would further result in discouraging new construction which would lead to a higher than normal rate of unemployment in the building trades and decreased sales of building supply materials. Until the Base property is sold, its holding costs would shift to the City, resulting in a substantial cost burden on City taxpayers, which burden would include the costs of needed increased police and fire protection. All of the foregoing consequences would result in a severe impact upon the City's budget and ability to provide needed services to its other residents.

27. Plaintiff, the Town of Plattsburgh, New York, would be immediately, substantially, and irreparably harmed by the closure of Plattsburgh Air Force Base because of the substantial shrinkage and negative impact upon its economy which would be caused by the loss of approximately 3,000 jobs from the closure of Plattsburgh Air Force Base. In addition, the closure of the Base would cause the loss of substantial sales tax revenues. Furthermore, military con-

tracts for base construction and updating of base facilities have been terminated, and future contracts will not be let, causing the loss of hundreds of construction-related jobs, with the resultant destabilization of the local economy. All of the foregoing consequences would result in a severe impact upon the Town's budget and ability to provide needed services to its other residents.

28. Plaintiff, the County of Clinton, New York, would be immediately, substantially, and irreparably harmed by the closure of Plattsburgh Air Force Base because of the substantial shrinkage and negative impact upon its economy which would be caused by the loss of approximately 3,000 jobs from the closure of Plattsburgh Air Force Base. In addition, the closure of the Base would cause the loss of substantial sales tax revenues. Furthermore, military contracts for base construction and updating of base facilities have been terminated, and future contracts will not be let, causing the loss of hundreds of construction-related jobs, with the resultant destabilization of the local economy. All of the foregoing consequences would result in a severe impact upon the County's budget and ability to provide needed services to its other residents. In addition, the County would be immediately, substantially and irreparably harmed by the loss of substantial tipping fees paid by Plattsburgh Air Force Base relating to solid waste disposal, as such tipping fees covered the cost of the large County-owned facilities which were enhanced in size because of the use made of them by the Base.

29. Plaintiff, Local Union No. 3735 of the American Federation of Government Employees would be immediately, substantially, and irreparably harmed by the closure of Plattsburgh Air Force Base as a result of all its members

losing their jobs at the Base. Significant numbers of its members would experience difficulty reentering the labor force without substantial retraining.

30. Plaintiffs, John J. Duffy, Brian F. Stone, Phillip Sprague, Girard F. Curtis, John Bryant, John Wallace, and Clarence J. Jefferies would be immediately, substantially and irreparably harmed by the closure of Plattsburgh Air Force Base by the loss of their jobs on the Base, and in addition, plaintiff, John J. Duffy, would also be similarly harmed by virtue of representing the aforesaid Union, all of whose members would lose their jobs as a result of the closure of the Base.

JURISDICTION

31. The claims of plaintiffs are founded upon, and jurisdiction of this action is maintained under 28 U.S.C. §§ 1331 (existence of a federal question), 1337, 1346(a)(2), 1361, the Defense Base Closure and Realignment Act of 1990 (Public Law No. 101-510, Title XXIX, §§ 2901-2910, November 5, 1990), the Administrative Procedure Act (5 U.S.C. 701 *et. seq.*), and common law principles of judicial review and the separation of powers. A declaratory judgment and further relief nullifying the aforesaid recommendations of the Commission and the President, and obtaining injunctive relief are appropriate under 28 U.S.C. §§ 2201 and 2202.

VENUE

32. Venue of this action in the Northern District of New York is proper under 28 U.S.C. §§ 1391(b) and (e), and 1402(a)(1).

DEFENSE BASE CLOSURE AND REALIGNMENT ACT OF 1990

33. The Act's purpose is "to provide a fair process that will result in the timely closure and realignment of military installations inside the United States." § 2901(b).

34. The Act creates an independent commission, denominated the "Defense Base Closure and Realignment Commission", which is appointed by the President of the United States with the advice and consent of the United States Senate. § 2902(a).

35. The Secretary is obligated to provide the United States Congress and the Commission with a six year "force structure plan" for the United States Armed Forces that assesses national security threats and the force structure needed to meet them. § 2903(a)(1)-(2).

36. The Act also requires the Secretary to formulate criteria for use in identifying bases for closure or realignment. These criteria are required to be published in the Federal Register for public notice and comment, and are further required to be submitted to the United States Congress for evaluation and approval. § 2903(b).

37. In order to initiate the base closure and realignment procedure, the Secretary must recommend base closures and realignments by April 15 of the year in issue, and such recommendations must be predicated upon the aforesaid force structure plan and final criteria. § 2903(c)(1).

38. The Commission must then review these recommendations, and prepare a report for the President containing its review and analysis of the Secretary's proposals and the Commission's recommendations for base closures and realignments. § 2903(d)(2).

39. The Act requires the Commission to hold public hearings on the Secretary's recommendations. § 2903(d)(1).

40. Sections 2903(d)(2)(B) of the Act provides that "the Commission may make changes in any of the recommendations made by the Secretary if the Commission determines that the Secretary deviated substantially from the force structure plan and final criteria referred to in subsection (c)(1) in making recommendations."

41. Sections 2903(d)(2)(C) & (D) of the Act provide that the Commission may add a military installation to the list of military installations recommended by the Secretary for closure or realignment "only if," among other requirements, the Commission makes the determinations required by § 2903(d)(2)(B) that the Secretary deviated substantially from the force structure plan and final criteria, and "publishes notice of the proposed change in the Federal Register not less than 30 days before transmitting its recommendations to the President. . . ."

42. The Commission's report to the President must explain and justify any departure from the Secretary's list of recommendations. § 2903(d)(3).

43. After the Commission has made its recommendations, the Act requires that by July 1 of the year in issue they be presented to the President for his review. § 2903(d)(2)(A).

44. The President may approve the Commission's recommendations, or disapprove them, in whole or in part, and must transmit his determination to the Commission and the United States Congress. § 2903(e)(2)-(3).

45. If the President approves the recommendations of the Commission, the United States Congress has 45 days from the date of this approval to pass a joint resolution disapproving of the Commission's recommendations in their entirety. §§ 2904(b), 2908.

46. If such a Congressional disapproval resolution is enacted, the Secretary may not close the bases approved for closure by the President. § 2904(b).

47. If the President disapproves the Commission's recommendations, in whole or in part, he returns them to the Commission. The Commission then reconsiders its recommendations in view of the President's actions, and resubmits a revised list for the President's consideration by August 15. § 2903(e)(3).

48. If the President does not send to the U.S. Congress an approved list of recommendations (in the form in which it is

returned by the Commission) by September 1st of the year in which the Commission has transmitted such recommendations to the President, the base closure process for that year is terminated. § 2903(e)(5).

BACKGROUND

49. On February 15, 1991, the Secretary, pursuant to the Act, published in the Federal Register, for public notice and comment, the criteria used by him in identifying bases for closure or realignment. § 2903(b).

50. On or about February 15, 1991, these criteria were presented to the United States Congress which evaluated and approved them on or about March 15, 1991, as required by the Act. § 2903(b).

51. In December, 1992, the Secretary announced that the final criteria to be used in 1993 would be identical to those used in 1991.

52. On March 12, 1993, the Secretary provided the United States Congress and the Commission with a six year force structure plan assessing national security threats and the force structure needed to meet them for the years 1994 through 1999. § 2903(a)(1)-(2).

53. On March 15, 1993, the Secretary, pursuant to the Act, recommended base closures and realignments to the Commission based upon the aforesaid force structure plan and final criteria used in identifying bases for closure or realignment. § 2903(c)(1).

54. In his recommendations, the Secretary did not recommend Plattsburgh Air Force Base for either realignment or closure, having previously determined that Plattsburgh Air Force Base would, for the proper defense of the nation, remain open as the east coast home base of one of two newly-conceived composite units called Air Mobility Wings. In fact, the Secretary, in its March 15, 1993, recommendations stated the following as its justification for the realignment of McGuire Air Force Base:

> The Air Force plans to establish a large mobility base in the Northeast to support the new Major Regional Contingency (MRC) strategy. McGuire was evaluated specifically as the location for this wing, along with other bases that met the geographical criteria and were available for this mission: Griffis AFB, New York and Plattsburgh AFB, New York. Plattsburgh AFB ranked best in capability to support the air mobility wing due to its geographical location, attributes, and base loading capacity. Principal mobility attributes include aircraft parking space (for 70-80 tanker/airlift aircraft), fuel hydrants and fuel supply/storage capacity, along with present and future encroachment and airspace considerations.
>
> When Plattsburgh AFB was compared directly with McGuire AFB, Plattsburgh AFB rated better in all of the mobility attributes. An air mobility wing at Plattsburgh AFB will eliminate many of the problems associated with operating at McGuire AFB, in the midst of the New York/New Jersey air traffic congestion. Basing the additional aircraft of an air mobility wing at McGuire AFB will add to that congestion. Plattsburgh AFB, on the other hand, has

> ample airspace for present and future training by an air mobility wing. Also, the FAA has long expressed a desire for civil use of McGuire AFB, which will ease the congestion at other airfields and terminal facilities in the New York and Philadelphia metropolitan areas. For these reasons, McGuire AFB was recommended for realignment and conversion to an Air Force Reserve Base.

55. The Secretary's decision to retain Plattsburgh Air Force Base as the home of the East Coast Air Mobility Wing was determined to be consistent with the force structure plan and final criteria based upon an analysis of 160 separate factors which were formulated by the United States Air Force.

56. This discussion of Plattsburgh Air Force Base by the Secretary as part of the recommendation regarding McGuire Air Force Base was necessary since the location of the East Coast Air Mobility Wing at Plattsburgh Air force Base played a key role in determining the Secretary's recommendations regarding realignment of McGuire Air Force Base.

57. Since the discussion of Plattsburgh Air Force Base by the Secretary was not in the form of a separate recommendation for either closure or realignment, but only in the context of the recommendation regarding disposition of McGuire Air Force Base, such discussion was confined solely and exclusively to the only relevant factor therein--the air mobility wing. In other words, there was no discussion by the Secretary of other needed military uses of Plattsburgh, if it were not to serve as home of the East Coast Air Mobility Wing.

58. Notwithstanding the Secretary's designation of Plattsburgh Air Force Base as the location of the East Coast Mobility Wing, on June 1, 1993, the Commission published a notice in the Federal Register purporting to add Plattsburgh Air Force Base, among other military installations, to the list the Commission would "consider as proposed additions to the Secretary of Defense's March, 1993 list of military installations recommended for closure or realignment." The Commission made no findings of substantial deviation before adding Plattsburgh to the list of military installations, nor did the Commission explain its additions in any manner whatsoever.

59. The Commission held hearings to consider and discuss the Secretary's recommendations as well as the additional military installations purportedly added by the Commission. In addition, the Commission requested its staff to analyze the recommendations of the Secretary, as well as various "scenarios" not recommended by the Secretary of Defense. Several of these "scenarios" focussed on the question of which base should, in the opinion of the Commission, be the base of the East Coast Air Mobility Wing, notwithstanding that the Secretary had made this determination and had made no recommendation to the Commission regarding Plattsburgh Air Force Base.

60. On June 24, 1993, after consideration by the Commission of various comparisons of McGuire, Griffis and Plattsburgh Air Force Bases for compatibility for the Air Mobility Wing mission, Commissioner Johnson made a motion relating to the Secretary's recommendation to realign McGuire Air Force Base. Commissioner Johnson prefaced his statement by brief remarks explaining why he believed that "McGuire is the proper base for an East Coast Mobility

base." His remarks focussed primarily on the location of McGuire and did not mention any basis for a conclusion that the Secretary in choosing Plattsburgh as the Mobility Wing location had substantially deviated from the force structure plan and the final criteria.

61. In response to Commissioner Johnson's remarks regarding his opinion of the proper base for the Air Mobility Wing mission, Commissioner Byron noted that the Act requires substantial deviation before the Commission can change a recommendation of the Secretary. She noted that even under the Commission's own staff analysis of the three bases, McGuire did not come in at the top of the list for the Air Mobility Wing mission. She stated that the case for substantial deviation had not been made on the record before the Commission.

62. Notwithstanding Commissioner Byron's comments, Commissioner Johnson made a motion to the effect that the Secretary's recommendation to realign McGuire substantially deviated from the final criteria 1, 2, 3, and 4, that McGuire be retained as an active installation, and that McGuire be established as the East Coast Air Mobility Wing Base. The motion did not state that the Commission found that the Secretary's recommendation substantially deviated from the force structure plan, nor could any such finding have been based upon the evidence presented to the Commission. The motion was passed by the Commission by a vote of 6-1.

63. The record of the public hearings held by the Commission in Washington D.C. during June, 1993, indicates that no significant information was presented to the Commission which supported the closing of Plattsburgh Air

Force Base, much less a demonstration that the Secretary's decision to keep it open deviated substantially from the force structure plan and final criteria. Rather, the record contains explicit acknowledgments by the Commission and its staff that Plattsburgh was well suited to the Air Mobility Wing Mission. Commissioner Johnson, when he made his motion to make McGuire the Air Mobility Wing Base, stated that "Plattsburgh has the best facilities," "Plattsburgh has, by far, the largest" ramp, both Plattsburgh and Griffis "have relatively less [air] congestion."

64. The primary basis offered by Commissioner Johnson for his motion designating McGuire as the East Coast Mobility Wing Base was its location near "customers." This was reiterated and confirmed by remarks made by Commissioners Johnson and Courter after the vote. However, the Air Force plainly considered the location of the three bases, Griffis, McGuire and Plattsburgh in making its determination. The location of McGuire was considered not appropriate for the Air Mobility Wing mission because of air congestion. While the Commission acknowledged the air congestion near McGuire, and that there was no such congestion near Plattsburgh, the Commission determined that the Mobility Wing mission could still be accommodated at McGuire. The Commission, however, failed to demonstrate how the Secretary deviated substantially from the final criteria in determining that Plattsburgh should be the East Coast Mobility Base.

65. Following this vote, and following further discussion regarding other Air Force Bases, none of which focussed on any substantial deviation of the Secretary with respect to Plattsburgh Air Force Base, Commissioner McPherson made the following motion with respect to Plattsburgh Air Force Base:

> I move that the Commission find that the Secretary of Defense deviated substantially from Criteria 2 and 4 and, therefore, that the Commission adopt the following recommendation:
>
> Close Plattsburgh Air Force Base and transfer the KC-135s to McGuire Air Force Base. The Commission finds that this recommendation is consistent with the force structure plan and final criteria.

The motion did not state that the Secretary's recommendation regarding Plattsburgh Air Force deviated substantially from the force structure plan, nor could any such finding have been made based upon the evidence presented by the Commission. Indeed, the Secretary had made no recommendation regarding closure or realignment of Plattsburgh Air Force Base. The motion was passed by a vote of 6-1.

66. On July 1, 1993, the Commission delivered a written report to the President containing its assessment of the Secretary's proposals and its own recommendations for base closures, which included the recommendation that Plattsburgh Air Force Base be closed. § 2903(d)(2). The report contained purported justifications and findings not offered by the Commission or its members at the time of the vote on the motions discussed above, and not based on the record before the Commission.

67. The Commission's report recommending to the President that the Base be closed constitutes the very first time under this Act that the Commission recommended the closure of a major base which the Secretary recommended to remain open.

68. On July 2, 1993, the President approved the recommendations of the Commission, and transmitted his approval to the Commission and the U.S. Congress. § 2903 (e)(2)-(3)

69. As a result of the failure of the U.S. Congress to disapprove of the Commission's recommendations, the Secretary purports to be authorized to proceed with the closing and realignment of the military bases designated by the Commission's recommendations, including the closing of Plattsburgh Air Force Base.

FIRST CLAIM FOR RELIEF

70. Plaintiffs repeat and reallege each and every one of the allegations set forth in ¶¶ 1-69, inclusive, with the same force and effect as if fully set forth at length herein.

71. There is now existing between the parties hereto an actual controversy in respect to which plaintiffs are entitled to have a declaration of their rights, and further relief because of the facts, conditions, and circumstances as set forth in this complaint.

72. If the Secretary makes no recommendation under the Act to close or realign a particular military base, the Commission has no authority to change the status of that base

because of the absence of any standard against which the Commission can measure its authority to make such a change, since the Act only allows the Commission to change recommendations of the Secretary which deviate substantially from the force structure plan and final criteria.

73. The Act states that the findings and conclusions of the Commission's report to the President must be "based on a review and analysis of the recommendations made by the Secretary." § 2903 (d)(2)(A). In addition, the Act requires the Commission to explain and justify any of its recommendations which differ from those of the Secretary. § 2903(d)(3).

74. The only military bases which are subject to closure or realignment by the Commission under the Act are those military bases which the Secretary specifically chooses to make the subject of his recommendations to the Commission.

75. On page I-76 of its report to the President, the Commission expressly acknowledged that the Secretary had issued no recommendation regarding Plattsburgh Air Force Base, through its recitation of the word "None" under the heading of DEPARTMENT OF DEFENSE RECOMMENDATION for Plattsburgh Air Force Base.

76. The Secretary did not have the opportunity to present to the Commission a position concerning other needed military uses of Plattsburgh Air Force Base, if it were not to be the home of the East Coast Air Mobility Wing, because such a discussion was not necessary or required by the Act since

Plattsburgh Air Force Base was not recommended to be closed or realigned by the Secretary.

77. The Commission's decision to close Plattsburgh Air Force Base without any input from the Secretary concerning other needed military uses of the Base if it were not to be used as home of the East Coast Air Mobility Wing constitutes a usurpation by the Commission of the Secretary's authority to establish the defense policy of the United States.

78. The Commission had no authority to close Plattsburgh Air Force Base, sinee there was no recommendation by the Secretary (to close or realign Plattsburgh) against which it could determine (as required by the Act) the presence of a substantial deviation by the Secretary from the force structure plan and final criteria.

79. As a result, the Commission's recommendation to close Plattsburgh Air Force Base was in excess of its authority under the Act, since it was not based upon a recommendation from the Secretary which deviated substantially from the force structure plan and final criteria.

80. The President improperly and invalidly made his decision to approve the Commission's recommendation to close Plattsburgh Air Force Base, because prior to making this decision, he had received the Commission's aforesaid recommendation which, for the reasons stated hereinabove, was not in compliance with the dictates of the Act.

81. Plaintiffs have no prompt, adequate and effective remedy at law, and this action is the only available means to them to secure the protection of their rights.

82. As a result of the foregoing, both the Commission and the President exceeded their power and authority under the Act, and plaintiffs are thereby entitled to a declaratory judgment, pursuant to 28 USC §§ 2201 and 2202, declaring and adjudging that the Commission's recommendation to the President, dated July 1, 1993, to close Plattsburgh Air Force Base, and the President's decision approving such closure is illegal, null and void, and of no force and effect, and that any action taken by defendant Les Aspin, as Secretary of Defense, Sheila Widnall, as Secretary of the Air Force, and their employees and agents, to close Plattsburgh Air Force Base is illegal, null and void, and of no force and effect.

SECOND CLAIM FOR RELIEF

83. Plaintiffs repeat and reallege each and every allegation contained in ¶¶ 1-82 inclusive of this complaint with the same force and effect as if fully set forth at length herein.

84. Before placing Plattsburgh Air Force Base on its list of military bases recommended for closure, the Commission must first demonstrate that the Secretary deviated substantially from the force structure plan and final criteria in retaining Plattsburgh Air Force Base as the proposed home of the East Coast Mobility Wing. § 2903(d)(C).

85. On June 1, 1993, the Commission improperly placed Plattsburgh Air Force Base on its closure list without first having demonstrated that it met the aforesaid substantial deviation standard as required by the Act.

86. The President improperly and invalidly made his decision to approve the Commission's recommendation to close Plattsburgh Air Force Base, because prior to making this decision, the Commission had failed to demonstrate such substantial deviation, which was not in compliance with the dictates of the Act.

87. As a result of the foregoing, both the Commission and the President exceeded their power and authority under the Act, and plaintiffs are thereby entitled to a declaratory judgment, pursuant to 28 USC §§ 2201 and 2202, declaring and adjudging that the Commission's recommendation to the President, dated July 1, 1993, to close Plattsburgh Air Force Base, and the President's decision approving such closure is illegal, null and void, and of no force and effect, and that any action taken by defendant Les Aspin, as Secretary of Defense, Sheila Widnall, as Secretary of the Air Force, and their employees and agents, to close Plattsburgh Air Force Base is illegal, null and void, and of no force and effect.

THIRD CLAIM FOR RELIEF

88. Plaintiffs repeat and reallege each and every allegation contained in ¶¶ 1-87 inclusive of this complaint with the same force and effect as if fully set forth at length herein. Each allegation of this claim assumes, without conceding, that the Secretary issued to the Commission a "recommendation" regarding Plattsburgh Air Force Base that was reviewable by the Commission.

89. The Commission is authorized to change such recommendations of the Secretary only if they "deviate [ ] substantially" from the force structure plan *and* the final criteria, and the Commission both explains and justifies in its report to the President the changing of such a recommendation. §§ 2903(d)(2)(B), 2903(d)(3).

90. Neither the Commission's motion of June 24, 1993, nor the Commission's report to the President of July 1, 1993, recited, explained or demonstrated how the Secretary's recommendation with respect to Plattsburgh Air Force Base deviated substantially from the force structure plan, as explicitly required by the Act.

91. The Commission's report to the President did not, as required by the Act, "explain and justify" its departure from the Secretary's recommendation to keep Plattsburgh Air Force Base open. § 2903(d)(3).

92. The President improperly and invalidly made his decision to approve the Commission's recommendation to close Plattsburgh Air Force Base, because prior to making this decision, he had received the Commission's aforesaid recommendation which, for the reasons stated hereinabove, was not in compliance with the dictates of the Act.

93. As a result of the foregoing, both the Commission and the President exceeded their power and authority under the Act, and plaintiffs are thereby entitled to a declaratory judgment, pursuant to 28 USC §§ 2201 and 2202, declaring

and adjudging that the Commission's recommendation to the President, dated July 1, 1993, to close Plattsburgh Air Force Base, and the President's decision approving such closure is illegal, null and void, and of no force and effect, and that any action taken by defendant Les Aspin, as Secretary of Defense, Sheila Widnall, as Secretary of the Air Force, and their employees and agents, to close Plattsburgh Air Force Base is illegal, null and void, and of no force and effect.

FOURTH CLAIM FOR RELIEF

94. Plaintiffs repeat and reallege each and every allegation contained in ¶¶ 1-93 inclusive of this complaint with the same force and effect as if fully set forth at length herein.

95. In making its recommendation to close Plattsburgh Air Force Base, the Commission not only failed to comply with, but totally ignored the substantial deviation standard of the Act which it was required to satisfy in order to justify overriding the determination by the Secretary to retain Plattsburgh Air Force Base as the home of the East Coast Mobility Wing.

96. The Secretary's decision to retain Plattsburgh Air Force Base as the home of the East Coast Air Mobility Wing was determined to be consistent with the force structure plan and final criteria based upon an analysis of 160 separate factors which were formulated by the United States Air Force.

97. The Commission made no finding either at the time of its motion on June 24, 1993 or in its written report, that the designation of Plattsburgh as the East Coast Air Mobility Wing Base deviated substantially from the force structure plan. This failure alone justifies the relief sought by plaintiffs since such a finding is an absolute prerequisite to the action taken by the Commission.

98. The Commission did state that the Secretary's findings regarding Plattsburgh Air Force Base substantially deviated from the final criteria, in spite of the fact that the Commission agreed with the findings of the Secretary on virtually all criteria identified by the Air Force as relevant to the location of the Air Mobility Wing as the Mobility Wing concept was developed by the Air Force.

99. The criterion regarding the closeness of Plattsburgh Air Force Base to customers and to on load points is not central to the concept of the Air Mobility Wing developed by the Air Force, being central only to a traditional airlift function.

100. As a result, by employing the criterion regarding the closeness to customers, the Commission ignored the Secretary's decision to establish an Air Mobility Wing in place of the traditional airlift function for Plattsburgh Air Force Base, and completely distorted the concept as developed by the Air Force and the Secretary.

101. As a result of ignoring the Secretary's decision to establish an Air Mobility Wing in place of a traditional airlift function, and/or determining that location based on traditional airlift considerations should be the predominant

factor, and recommending the closure of Plattsburgh Air Force Base predicated upon factors associated with the airlift function, the Commission, in excess of its authority, substituted its own views for that of the Secretary of Defense and established defense policy for the United States, when its only proper function under the Act was to determine if the Secretary's defense policy recommendations were consistent with the force structure plan and final criteria.

102. The Commission improperly applied cost-related data to the methods of cost analysis which it utilized in determining which base should serve as home of the East Coast Air Mobility Wing, and otherwise improperly utilized such methods of cost analysis, resulting in the erroneous finding that Plattsburgh Air Force Base would be more costly than McGuire Air Force Base as the designated home of the air mobility wing.

103. The Commission's written report purported to provide justification and "findings" for the Commission's actions that were not set forth by the Commission at the time it voted on the motions to make McGuire the Air Mobility Base and to close Plattsburgh. These subsequent findings, either singly or together, do not support a finding of substantial deviation from the force structure plan or the final criteria. They amount only to a mere recitation of factors of relatively minor significance, if any, to the Air Mobility Wing concept as designed and described by the Air Force. Further, the recitation simply ignores the major relevant factors as to which the Secretary and the Commission staff agreed supporting the conclusion that Plattsburgh was the best base for the Mobility Mission.

104. As a result of the foregoing, it is clear that the Commission not only failed to comply with, but totally ignored the substantial deviation standard set forth in the Act as an express limitation on its actions, substituted its judgment for that of Secretary on matters of defense policy, and thereby exceeded its authority under the Act by virtue of recommending the closure of Plattsburgh Air Force Base.

105. The President improperly and invalidly made his decision to approve the Commission's recommendation to close Plattsburgh Air Force Base, because prior to making this decision, he had received the Commission's aforesaid recommendation which, for the reasons stated hereinabove, was not in compliance with the dictates of the Act.

106. As a result of the foregoing, both the Commission and the President exceeded their power and authority under the Act, and plaintiffs are thereby entitled to a declaratory judgment, pursuant to 28 USC §§ 2201 and 2202, declaring and adjudging that the Commission's recommendation to the President, dated July 1, 1993, to close Plattsburgh Air Force Base, and the President's decision approving such closure is illegal, null and void, and of no force and effect, and that any action taken by defendant Les Aspin, as Secretary of Defense, Sheila Widnall, as Secretary of the Air Force, and their employees and agents, to close Plattsburgh Air Force Base is illegal, null and void, and of no force and effect.

FIFTH CLAIM FOR RELIEF

107. Plaintiffs repeat and reallege each and every allegation contained in ¶¶ 1-106 inclusive of this complaint with

the same force and effect as if fully set forth at length herein.

108. The Act requires that the Commission publish in the Federal Register any changes it proposes to make to the recommendations of the Secretary not less than 30 days before transmitting its recommendations to the President. § 2903 (d)(2)(C)(iii).

109. The Commission published in the Federal Register its notice that it intended to consider recommending the closure or realignment of Plattsburgh Air Force Base on June 1, 1993. The Commission transmitted its report to the President on July 1, 1993.

110. Plaintiffs maintain that the Commission had no authority to add Plattsburgh Air Force Base to the list of military installations because the Secretary submitted no recommendation with respect to Plattsburgh to the Commission, and because the Commission made no finding of substantial deviation from the force structure plan and final criteria before adding Plattsburgh. But if the Act is construed to allow the Commission to add Plattsburgh Air Force Base to the list, then as a result of the foregoing, the Commission violated the Act by its untimely publication in the Federal Register only 29 days before the transmission of its report to the President, resulting in the invalidity of its recommendation to close Plattsburgh Air Force Base, and the President's subsequent approval of that recommendation.

111. As a result of the foregoing, both the Commission and the President exceeded their power and authority under

the Act, and plaintiffs are thereby entitled to a declaratory judgment, pursuant to 28 USC §§ 2201 and 2202, declaring and adjudging that the Commission's recommendation to the President, dated July 1, 1993, to close Plattsburgh Air Force Base, and the President's decision approving such closure is illegal, null and void, and of no force and effect, and that any action taken by defendant Les Aspin, as Secretary of Defense, Sheila Widnall, as Secretary of the Air Force, and their employees and agents, to close Plattsburgh Air Force Base is illegal, null and void, and of no force and effect.

SIXTH CLAIM FOR RELIEF

112. Plaintiffs repeat and reallege each and every allegation contained in ¶¶ 1-111 inclusive of this complaint with the same force and effect as if fully set forth at length herein.

113. In order to assure a fair procedure for base closing, the Act requires that the President be presented with balanced and informed advice before either approving or disapproving the Commission's recommendations regarding the closure or realignment of military bases. Such balanced and informed advice is to include Commission recommendations which are in accord with the Act's dictates that the Commission may change a recommendation of the Secretary regarding base closures only if: that recommendation substantially deviates from the force structure plan and final criteria; the Commission both explains and justifies in its report to the President the changing of such a recommendation; and the Commission's recommended closure is published in a timely fashion in the Federal Register.

114. The presentation to the President of a Commission recommendation advocating the closure of Plattsburgh Air Force Base which was not in compliance with the aforesaid statutory directives undermines the aforesaid purpose and intent of the Act to assure that both the President and Congress have access to balanced and informed advice before rendering any decision under the Act to close or realign military bases.

115. The President did not have statutory authority to render a decision either approving or disapproving the Commission's recommendation regarding the closure of Plattsburgh Air Force Base, because the Commission's recommendation, which the President received before making such a decision, was not in compliance with the aforesaid dictates of the Act.

116. The action of the President in approving the closure of Plattsburgh Air Force Base, after receipt of the improperly prepared Commission recommendation, constitutes an action in violation of delegated executive authority to the President under the Act, resulting not only in the invalidity of the Commission's recommendation, but also the President's subsequent approval of it.

117. As a result of the foregoing, both the Commission and the President exceeded their power and authority under the Act, and plaintiffs are thereby entitled to a declaratory judgment, pursuant to 28 USC §§ 2201 and 2202, declaring and adjudging that the Commission's recommendation to the President, dated July 1, 1993, to close Plattsburgh Air Force Base, and the President's decision approving such closure is illegal, null and void, and of no force and effect, and that any action taken by defendant Les Aspin, as Secre-

tary of Defense, Sheila Widnall, as Secretary of the Air Force, and their employees and agents, to close Plattsburgh Air Force Base is illegal, null and void, and of no force and effect.

SEVENTH CLAIM FOR RELIEF

118. Plaintiffs repeat and reallege each and every allegation contained in ¶ 1-117, inclusive, of this complaint, with the same force and effect as if fully set forth at length herein.

119. The requirement of the Act that the Commission may not change the recommendations of the Secretary concerning base closure unless they deviate substantially from the force structure plan and final criteria, constitutes an explicit substantive and procedural limitation upon the Commission's authority to change the Secretary's recommendations whether a particular military base should be closed or realigned, and such limitation is intended for the benefit of the plaintiffs herein.

120. The action of the Commission in deciding to close Plattsburgh Air Force Base, despite the absence of a recommendation of the Secretary, (or at most a contrary recommendation of the Secretary) constitutes an action which ignored this statutory requirement, and was, therefore, in excess of the Commission's authority under the Act.

121. Compliance by the Commission with this statutory requirement would necessarily have caused the Commission and the President to have followed the recommendation of the Secretary to keep Plattsburgh Air Force Base open.

122. Pursuant to the Act, the President has the discretion to accept or reject in its entirety the recommendations of the Commission regarding base closure or realignment.

123. In order to assure a fair procedure for base closing, the Act requires that the President be presented with balanced and informed advice before approving or disapproving the Commission's recommendations. Such balanced and informed advice is to include Commission recommendations which are in accord with the Act's dictates that the Commission may only change a recommendation of the Secretary regarding whether a base is to be closed or realigned which substantially deviates from the force structure plan and final criteria.

124. The presentation to the President of recommendations of the Commission not in compliance with this statutory directive undermines the purpose and intent of the Act to assure that both the President and Congress have access to balanced and informed advice before rendering any decision under the Act to close or realign military bases.

125. The President improperly and invalidly made his decision to approve the Commission's recommendation to close Plattsburgh Air Force Base, because prior to making this decision, he had received the Commission's aforesaid recommendation which, for the reasons stated hereinabove, was not in compliance with the dictates of the Act.

126. The Act entitles plaintiffs to a fair process in the determination of which bases should be closed or realigned.

127. The Act entitles plaintiffs to have Plattsburgh Air Force Base remain open and in operation, unless and until it is determined in accordance with the Act that the closure is warranted.

128. Each of the plaintiffs, for the reasons stated hereinabove, have a property interest in the continued operation of Plattsburgh Air Force Base.

129. The failure to comply with the procedures and substantive limitations set forth in the Act, as described hereinabove, illegally interferes with rights granted to the plaintiffs under the Act, and constitutes a deprivation of plaintiffs' property interests without due process of law, in violation of the Due Process Clause of the Fifth Amendment to the U.S. Constitution.

130. As a result of the foregoing, the Commission and the President exceeded their power and authority under the Act, and plaintiffs are thereby entitled to a declaratory judgment, pursuant to 28 USC §§ 2201 and 2202, declaring and adjudging that the Commission's recommendation to the President, dated July 1, 1993, to close Plattsburgh Air Force Base, and the President's decision approving such closure is illegal, null and void, and of no force and effect, and that any action taken by defendant Les Aspin, as Secretary of Defense, Sheila Widnall, as Secretary of the Air Force, and their employees and agents, to close Plattsburgh Air Force Base is illegal, null and void, and of no force or effect.

EIGHTH CLAIM FOR RELIEF

131. Plaintiffs repeat and reallege each and every allegation contained in ¶¶ 1-130 inclusive, of the within complaint, with the same force and effect as if fully set forth herein.

132. Actions by the President of the United States under legislatively delegated authority must be consistent with the terms of the legislation which authorized it.

133. The action of the President in approving the closure of Plattsburgh Air Force Base after receipt of Commission recommendations which were not in compliance with the explicit requirements of the Act constituted an unauthorized usurpation of power by the President, without statutory or constitutional authority.

134. Therefore, this action by the President violated the doctrine of separation of powers provided in the United States Constitution, and also invalidated the Commission's recommendation to the President to close Plattsburgh Air Force Base.

135. As a result of the foregoing, the Commission and the President exceeded their power and authority under the Act, and plaintiffs are thereby entitled to a declaratory judgment, pursuant to 28 USC §§ 2201 and 2202, declaring and adjudging that the Commission's recommendation to the President, dated July 1, 1993, to close Plattsburgh Air Force Base, and the President's decision approving such closure is illegal, null and void, and of no force and effect, and that any action taken by defendant Les Aspin, as Secre-

tary of Defense, Sheila Widnall, as Secretary of the Air Force, and their employees and agents, to close Plattsburgh Air Force Base is illegal, null and void, and of no force or effect.

NINTH CLAIM FOR RELIEF

136. Plaintiffs repeat and reallege each and every allegation contained in ¶¶ 1-135 inclusive, of the within complaint, with the same force and effect as if fully set forth herein.

137. The recommendation and vote of the Commission to close Plattsburgh Air Force Base is subject to review under 5 U.S.C. § 706(2), and is unlawful and must be set aside because, among other things, it constitutes an action that is arbitrary, capricious, an abuse of discretion, otherwise not in accordance with the law, contrary to constitutional right, power, privilege and immunity, in excess of statutory jurisdiction, authority, and limitations, short of statutory right, and without observance of procedure required by law.

138. The President improperly and invalidly made his decision to approve the Commission's recommendation to close Plattsburgh Air Force Base, because prior to making this decision, he had received the Commission's aforesaid recommendation which, for the reasons stated hereinabove, was not in compliance with the dictates of the Act.

139. No further right of review or appeal, or any other remedy is available to plaintiffs before the Commission or any other tribunal or court, or under the terms of the Act or any other statute, and substantial, irreparable and immediate

harm and injury will be sustained by the plaintiffs in the absence of the granting of the relief requested herein.

140. As a result of the foregoing, the Commission and the President exceeded their power and authority under the Act and 5 U.S.C. § 706(2), and plaintiffs are thereby entitled to a declaratory judgment, pursuant to 28 USC §§ 2201 and 2202, and 5 U.S.C. §§ 701 *et seq*. declaring and adjudging that the Commission's recommendation to the President, dated July 1, 1993, to close Plattsburgh Air Force Base, and the President's decision approving such closure is illegal, null and void, and of no force and effect, and that any action taken by defendant Les Aspin, as Secretary of Defense, Sheila Widnall, as Secretary of the Air Force, and their employees and agents, to close Plattsburgh Air Force Base is illegal, null and void, and of no force or effect.

TENTH CLAIM FOR RELIEF

141. Plaintiffs repeat and reallege each and every allegation contained in ¶¶ 1-140 inclusive, of the within complaint, with the same force and effect as if fully set forth herein.

142. The aforementioned lack of compliance with the requirements of the Act adversely effect and aggrieve the plaintiffs by denying to them a fair procedure for the closure of Plattsburgh Air Force Base, as guaranteed by the Act, and further denying to them due process of law, as guaranteed by the Due Process Clause of the Fifth Amendment of the United States Constitution.

143. As a result of the foregoing, including but not limited to the factors of economic and other harm to plaintiffs, as previously set forth herein, there will be immediate, substantial, and irreparable harm and injury to plaintiffs resulting from the closure of Plattsburgh Air Force Base without full compliance with the Act.

144. As a result of the foregoing, plaintiffs are entitled to an injunction enjoining the defendant, Les Aspin, as Secretary of Defense, Sheila Widnall, as Secretary of the Air Force, and their agents and employees, from taking any action to close the Plattsburgh Air Force Base based upon any approval by the President to close the Base, in response to the recommendation of the Commission, dated July 1, 1993, to close the Base, and further enjoining them from taking any action to make McGuire Air Force Base the home base of the East Coast Air Mobility Wing.

145. Plaintiffs have no prompt, adequate and effective remedy at law, and this action, including the granting of the injunction requested herein, is the only available means to them to avoid the aforesaid immediate, substantial, and irreparable harm and injury, and to secure the protection of their rights.

WHEREFORE, plaintiffs demand judgment on their first, second, third, fourth, fifth, sixth, seventh, eighth, and ninth claims for relief declaring and adjudging, pursuant to 28 U.S.C. 2201 and 2202, (and with respect only to their ninth claim, also pursuant to 5 U.S.C. 701 *et. seq*.) that the Defense Base Closure Commission's recommendation to the President, dated July 1, 1993, to close Plattsburgh Air Force Base, and the President's approval of this recommendation is illegal, null and void, and of no force and effect, and that any action taken by the defendants, Les Aspin, as

United States Secretary of Defense, Sheila Widnall, as United States Secretary of the Air Force, and their employees and agents, to close Plattsburgh Air Force Base is illegal, null and void, and of no force and effect; and plaintiffs demand judgment on their tenth claim for relief for an injunction enjoining the defendants Les Aspin, as United States Secretary of Defense, Sheila Widnall, as United States Secretary of the Air Force, and their agents and employees, from taking any action to close the Plattsburgh Air Force Base predicated upon any approval by the President to close the Base, in response to the recommendation of the Commission, dated July 1, 1993, to close the Base, and further enjoining the defendants Les Aspin, as United States Secretary of Defense, Sheila Widnall, as United States Secretary of the Air Force, and their agents and employees, from taking any action to make McGuire Air Force Base the home base of the East Coast Air Mobility Wing, and for such other, further and different relief as to the Court seems just and proper.

Dated: December 2, 1993
Albany, New York

Respectfully submitted,

ROBERT ABRAMS
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By: s/ Edward M. Scher

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